Court, U.S.
FILED
MAY 16 1983
ALEXANDER L. STEVAS,

No. 82-1684

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

MOTION TO DISMISS OR AFFIRM

RICHARD G. PETERSON
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
For Lone Steer, Inc.

OF COUNSEL:

JAMES PATRICK BARONE
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103

QUESTION PRESENTED

Whether the Secretary of Labor (through his agents) may proceed with an inspection of Lone Steer's records under Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) without having obtained a judicially issued warrant, as framed by the District Court in its Order. (J.S. at Appendix A)

PARTIES TO THE PROCEEDING

Lone Steer, Inc. was the Plaintiff in the District Court and is Appellee here.

TABLE OF CONTENTS

	Page
Opinions below	1
Constitutional and Statutory Provisions involved	1
Motion	3
Conclusion	4

TABLE OF AUTHORITIES

Cases:

Marshall v. *Barlow's, Inc.*
436 U.S. 307 ..... *3,4*

Constitution, statutes and regulations:

U.S. Const:
Amend. IV 1,3,4

Fair Labor Standards Act of 1938, 29 U.S.C. (Supp. V) 201 *et seq.*:
Section 9, 29, U.S.C. 209 2,4
Section 11, 29 U.S.C. 211 4
Section 11(a), 29 U.S.C. 211(a) 3,4

Federal Trade Commission Act of 1914, 15 U.S.C. (& Supp. V) 41 *et seq.*:

Occupational Safety and Health Act of 1970:
29 U.S.C. 657 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

MOTION TO DISMISS OR AFFIRM

OPINIONS BELOW

The opinion of the district court (App. A, *infra*, 1a-9a) is not reported. The order of the district court denying the motion to alter or amend the judgment (App. D, *infra*, 14a-15a) is not reported.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 11(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. 211(a), provides:

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

Section 9 of the Fair Labor Standards Act of 1938, 29 U.S.C. 209, provides:

> For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of title 15 (relating to the attendance of witnesses and the production of books, papers and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor and the industry committees.

Section 9 of the Federal Trade Commission Act of 1914, as amended, 15 U.S.C. 49, provides in pertinent part:

> For the purposes of this subchapter the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documen-

tary evidence of any person, partnership or corporation being investigated or proceeded against; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience of a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation to appear before the Commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

MOTION

Appellee hereby moves the Court to dismiss the appeal or, in the alternative, affirm the decision of the District Court for the District of North Dakota.

The stipulated facts as well as the summary of facts in appellants' Jurisdictional Statement reveals an enforcement scheme that violates appellee's privacy right guaranteed by the Fourth Amendment to the

United States Constitution as defined by *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978).

The undisputed facts reveal repeated attempts to enter the premises of appellee for the purpose of inspecting records. After acknowledging that the attempts to enter and inspect "unquestionably comport" with the provisions of the Fair Labor Standards Act of 1938, Section 11(a), the District Court addressed the controlling issue of the "constitutionally impermissible" nature of the statutory scheme (J.S. at Appendix A). The District Court held that the warrant requirement based on probable cause prior to nonconsensual searches applied to the Fair Labor Standards Act, Section 11(a), "with equal—if not greater—force" than to the Occupational Safety and Health Act of 1970, 29 U.S.C. 657 which was at issue in *Barlow's* (J.S. at Appendix A). Since the privacy interests to be protected under the Fourth Amendment related directly to entering the premises and inspecting the records under the Fair Labor Standards Act, Section 11(a), appellants' repeated attempts to enter the premises render invalid any claim that there has been, and is, no privacy interest involved in this matter.

Appellants apparently concede the applicability of the warrant requirement of the Fourth Amendment to the Constitution as defined in *Barlow's* to this matter. In appellants' Motion To Alter Or Amend Judgment, its only request was that an administrative subpoena duces tecum be allowed as the statutory enforcement mechanism (J.S. at Appendix E). The appellants did not request any change in the order of the District Court forbidding entry upon the premises of Lone Steer, Inc. for the purpose of inspecting its records under the Fair Labor Standards Act, Section 11(a), without first having obtained a valid warrant. The issue on appeal is the constitutional validity of the provisions of Section 11(a) of the Fair Labor Standards

Act which allows entering the premises for the purpose of inspection. That is the very issue which was decided by the District Court. Appellants are attempting to sidestep the constitutional principles of *Barlow's* in utilizing the enforcement mechanism of the Fair Labor Standards Act, Sections 11 and 9. A broad discovery devise, a subpoena, issued by the U.S. Labor Department itself, hardly may be viewed as the functional equivalent of a warrant, as required under *Barlow's*.

CONCLUSION

Since the decision of the District Court was based on *Marshall* v. *Barlow's, Inc.* 436 U.S. 307 (1978) as controlling precedent, the question is not substantial and this matter should be dismissed.

In the alternative, if the question is deemed to be substantial, the decision of the District Court was based on a thorough analysis of the Constitution, applicable federal statutes and judicial precedent. The decision should be affirmed.

Respectfully submitted,

RICHARD G. PETERSON
Attorney at Law
Peterson & Associates
808 Third Avenue South
Fargo, North Dakota 58103
(701) 280-2800
For Lone Steer, Inc.

OF COUNSEL:
JAMES PATRICK BARONE
Attorney at Law
Peterson & Associates

MAY 1983